Supreme Court, U.S.
FILED
JUN 1 2001
OFFICE OF THE CLERK

No. 00-1655

IN THE

Supreme Court of the United States

CHRISTOPHER J. PARRY,

Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC.,
AUSTINTOWN AMBULATORY ER,
MEDEXPRESS, and
DRUG FREE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AUSTINTOWN AMBULATORY ER

STEVEN J. HUPP
Counsel of Record
BONEZZI SWITZER MURPHY & POLITO
Attorneys for Respondent
Austintown Ambulatory ER
1400 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114
(216) 875-2767

167372

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Austintown Ambulatory ER, has no parent corporation and no publicly held company owns 10% or more of its stock.

REASONS FOR DENYING THE WRIT

NEITHER THE RECORD NOR THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS ADDRESSED THE UNREASONABLE SEARCH AND SEIZURE QUESTION PRESENTED BY THE PETITION.

Petitioner's second question presented regarding the alleged abuse of process and unreasonable search and seizure under the Fourth Amendment was not alleged by the pleadings in the District Court and was not addressed by the Sixth Circuit Court of Appeals' Opinion in this case.

In the District Court, Petitioner filed his original Complaint on January 28, 1998. Almost six months later, after the parties had engaged in a substantial amount of discovery and had filed dispositive motions, Petitioner sought leave to file an Amended Complaint, which was granted. In September of 1998, after further discovery and after the District Court suspended discovery pending its decision on Respondents' summary judgment motions, Petitioner filed his First Amended Complaint. On March 25, 1999, the District Court granted summary judgment to Respondents. (Petitioner's Appendix at E-1.) On June 8, 1999, Petitioner filed a Motion for Leave to file a Second Amended Complaint, which sought to assert a *Bivens*[1] claim. Thus, Petitioner was attempting to add an entirely new legal theory after Respondents had been granted summary judgment. The District Court denied Petitioner's Leave to file a Second Amended Complaint. Accordingly, Petitioner's second question presented, *i.e.* the *Bivens* claim for a violation of

---

1. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Petitioner's Fourth Amendment rights, was never even considered by the District Court.

The Sixth Circuit Court of Appeals determined that the District Court correctly denied Petitioner's Leave to file his Second Amended Complaint. Further, the Sixth Circuit Court of Appeal determined that the party seeking leave to amend his Complaint must act with due diligence, and that in any event, an amendment would have been futile since Petitioner had not stated a claim under *Bivens*. Specifically, the Sixth Circuit held:

> We do not decide whether Defendants' actions constitute federal action for purposes of a ***Bivens*** claim because, even assuming that they did, **Plaintiff has failed to allege and we do not believe that Plaintiff can allege and prove a violation of his constitutional rights.** Although Plaintiff has not alleged a violation of any specific constitutional right, this Court assumes, based on the facts, that Plaintiff would argue that his Fourth Amendment right against unreasonable searches was violated by the random drug test that he was required to take. Under the circumstances of this case, where Plaintiff, who occupies a safety sensitive position, was randomly chosen pursuant to federal regulations to take a single drug test and there is no showing of abuse of that process, we would not find a Fourth Amendment violation. [Emphasis added.]

Parry v. Mohawk Motors of Mich., Inc., 236 F.3d 299, 307 (6th Cir. 2000); Petitioner's Appendix at B-14.

This Court has held: "[o]ur normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (citation omitted). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn v. United States* 355 U.S. 339, 362-363 n.16 (1958); *see Auer v. Robbins*, 519 U.S. 452, 464 (1997) (determining that the Court will not consider an argument that was inadequately preserved in the prior proceedings). This Court has determined that prudence "dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538.

In this case, Petitioner's second question presented concerning the alleged violations of his Fourth Amendment rights were neither argued before the District Court nor addressed by the Sixth Circuit Court of Appeals' Opinion. In fact, the first time that Petitioner asserted the unreasonable search and seizure issue he presents to this Court was in his Petition for Panel Rehearing, which was denied by the Sixth Circuit Court of Appeals. As such, Petitioner's second question presented is not properly before this Court and Petitioner's Writ of Certiorari should be denied.

CONCLUSION

For these reasons, Respondent Austintown Ambulatory ER respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

STEVEN J. HUPP
Counsel of Record
BONEZZI SWITZER MURPHY & POLITO
Attorneys for Respondent
Austintown Ambulatory ER
1400 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114
(216) 875-2767